



**MINUTES  
FREMONT PLANNING COMMISSION  
REGULAR MEETING OF JUNE 24, 2004**

CALL TO ORDER: Chairperson Weaver called the meeting to order at 7:15 p.m.

PRESENT: Chairperson Weaver, Vice Chairperson Wieckowski, Commissioners Harrison, King, Lydon, Natarajan, Sharma

ABSENT: None

STAFF PRESENT: William Meeker, Planning Director  
Jeff Schwob, Deputy Planning Director  
Larissa Seto, Senior Deputy City Attorney II  
Norm Hughes, City Engineer  
Andrew Russell, Associate Engineer  
Kathleen Livermore, Senior Planner  
Len Banda, Special Assistant  
Alice Malotte, Recording Clerk  
Chavez Company, Remote Stenocaptioning  
Miriam Schalit, Video Technician

APPROVAL OF MINUTES: Regular Minutes of May 27 and June 10, 2004, were approved with the following change:

May 27<sup>th</sup> Minutes: the votes on page 16 should have been Yes/Natarajan and No/Wieckowski and Harrison.

**PUBLIC HEARING CONTINUED ITEMS**

**Chairperson Weaver** announced that the items continued from June 10<sup>th</sup> would be heard first and would be discussed until approximately 8:00 p.m. Each individual site under each Housing Element Program would be heard one at a time. Program 21, Sites 1, 2 and 3, Program 19, Site 1 and Program 18, Sites 2, 3 and 6 would not be considered at this hearing and would be discussed at a later date. She reminded Commissioners to advise the public of any conversations, emails or meetings that they had had with any of the involved parties. She pointed out a memo by Senior Deputy City Attorney Seto regarding State requirement that should help with understanding the issues to be decided. Speakers would be limited to two minutes. She noted that some people had indicated on their speaker cards that they did not wish to speak. She asked that the public respect the opinions of others and stated that she would not tolerate boos or any other kinds of disrespect towards the speakers.

**Deputy Planning Director Schwob** provided a brief overview for the three housing element items noting that this was a refined proposal before the Commission. Staff intended to work with the neighbors surrounding the sites that were not to be discussed at this hearing and would bring those refined proposals back to the Commission in the future. He noted a letter from the Department of Housing and Community Development (HCD) that stated, in part, that

their finding of compliance depended upon the success of the implementation of the programs by the dates specified in the housing element, basically, spring and summer of this year. They must be ready to report to City Council by September and HCD by October 1, 2004. Sixty-three percent of the goal would be accomplished if the sites before the Commission are rezoned. The remaining 37 percent totaled 1,860 units on 130 acres, of which 60 percent need to be at densities of over 20 units per acre.

**Senior Deputy City Attorney Seto** recalled questions about the requirements of the housing element, as required by State law. As indicated in the memo, the City was part of the Association of Bay Area Governments (ABAG), which includes nine counties and 111 cities. Housing needs were based upon job development, residential growth, population growth and other factors. The Regional Housing Needs Determination became mandates by the State. Staff agreed with the numbers that were assigned to the City. She compared the 6,700 units that were required by the State for the City to produce with the City of Milpitas, which was a much smaller city but still had a mandate of over 4,000 housing units. If the City of Fremont were to appeal the housing needs designation and ABAG agreed to a lower number of housing units for the City, the difference would have to be made up by some other city within the ABAG jurisdiction.

**Item 6. HOUSING ELEMENT PROGRAM 21 – (PLN2004-00251, and PLN2004-00272 through PLN2004-00275) – to consider the following General Plan Amendment and Rezonings:**

Site 4 (PLN2004-00251) consists of approximately 1.26 acres located on the northeast corner of Niles Boulevard and Kraftile Road in the Niles Planning Area. The proposed project would change the existing General Plan land use designation from General Industrial to Medium Density Residential (15 to 18 dwellings per acre). A rezoning of the site from the G-I (General Industrial) District to the R-3-18 (Multiple Family Residential) District is also proposed. A Mitigated Negative Declaration has been prepared and circulated for this project.

**Chairperson Weaver** announced that she had no speaker cards for Item 6 and 7 and one card for Item 8. She asked that the three speakers who submitted cards with no designation tell her which item they wished to speak about. She asked that Eugene Kaing, Lawrence Fok and Lorna Gordon tell staff which item they wished to speak. She then stated that she now had two cards for Item 6.

**Chairperson Weaver** opened the public hearing.

**Susan Neeman**, 17-year city resident now living in the Niles District, stated that she strongly supported increasing the density in the city, not only because of State mandates but because she believed that the financial viability of the city and the region depended on having all kinds of housing available for people like the city's teachers, nurses and firemen.

**Bill Durgin**, representing Cal West Properties, asked for questions about the future plans for the 18 acres that his company owned on Site 5.

**Chairperson Weaver** closed the public hearing.

**Commissioner Natarajan** stated that she completely supported the notion of higher density. However, she questioned if some of the smaller sites were appropriate. It would be difficult to do a good project on any site that was less than two acres that fit in with the neighborhood, given it would be surrounded by lower density residential units. Given that the City did not have landscaping and engineering standards, she would not support higher density at this location.

Site 5 (PLN2004-00272) consists of approximately 25.29 acres located on the southwest corner of Kato Road and Warm Springs Boulevard in the Industrial Planning Area. The proposed project would change the existing General Plan land use designation from Restricted Industrial (with a Commercial-Industrial Overlay) to Medium Density Residential (11 to 15 dwellings per acre), Medium Density Residential (18 to 23 dwellings per acre), and High Density Residential (23 to 27 dwellings per acre). A rezoning of the site from the I-R (Restricted Industrial) District to the R-3-15 (Multiple Family Residential), R-3-23 (Multiple Family Residential) and R-3-27 (Multiple Family Residential) Districts is also proposed. A Mitigated Negative Declaration has been prepared and circulated for this project.

**Chairperson Weaver** opened the public hearing and asked Mr. Durgin if he wished to speak again.

**Chairperson Weaver** closed the public hearing.

**Commissioner Harrison** asked that staff discuss how this action would affect the existing business at this site.

**Deputy Planning Director Schwob** stated that the existing uses would become nonconforming, but would be allowed under the nonconforming ordinance to make minor changes and modifications to the buildings that did not exceed a certain percentage of the total assessed value. The buildings could continue to be occupied until the properties were proposed for redevelopment.

**Commissioner Harrison** asked if the building could be rebuilt in case of fire, for example without any problems.

**Deputy Planning Director Schwob** replied that, in that case, if the building was destroyed more than 50 percent, they wished to rebuild, they would have to conform to the residential use.

**Commissioner Natarajan** asked how far the site was from the BART station and what was the reason for looking at three different densities. She asked if this was the site that was proposed to be developed at 18 to 23 density.

**Deputy Planning Director Schwob** guessed that the distance was approximately three miles. It was hoped that the three different densities would accommodate a variety of housing products with a variety of densities. Regarding the portion of the site designated for 18-23 along Kato Road, it was noted that landscaping or parking would have to be installed along the front of the property because of a very large storm drain and other utilities there at the front of the property.

**Commissioner Natarajan** asked if the whole site could be designated 18 to 23.

**Deputy Planning Director Schwob** replied that, in this particular instance, staff had seen a proposal for this property and staff believed that it would work this way. The representative was in attendance to answer any questions.

**Commissioner Natarajan** stated that it seemed that this location could support a community and its higher densities which could help to avoid high densities on smaller parcels.

**Deputy Planning Director Schwob** replied that the densities could be slightly shifted elsewhere on the site but that the total number of units planned for this site could not be increased without further environmental review. He suggested that this site be reevaluated and brought back with the next tier or it could be approved as proposed with the request that it be brought back for subsequent redesignation and rezoning to higher densities.

**Vice-Chairperson Wieckowski** asked if it was close to the infill site under construction near Milpitas.

**Deputy Planning Director Schwob** said that these four parcels were adjacent to that site.

**Vice-Chairperson Wieckowski** stated that this was “an excellent place to do what we’re doing.”

**Vice-Chairperson Wieckowski** suggested a “friendly amendment” to allow staff to bring this site back at a later date with other sites, so that it might be reevaluated at a higher density.

A discussion ensued between Commissioner Harrison and Commissioner Natarajan about making the density higher on this site.

**Chairperson Weaver** stated that she would allow Mark Robson to speak.

**Mark Robson**, Santa Clara Development, stated that his company controlled about 7 ½ acres on this site and that his company was the developer of the site immediately south called Mayfield, whose density was at 13 ½ per acre. He had already established a pattern of higher density at the front of the property with lower density towards the rear. So staff designated this property the same way. He expected to bring in a proposal for this site within the next three to four weeks and he supported staff’s recommendation at the density they were recommending.

**Commissioner Natarajan** asked what the prototypes would be.

**Mr. Robson** replied that they planned to build flats, similar to the Mayfield project, which were at a density of about 20 units to the acre, along with triplex units at 16 units per acre.

**Commissioner Harrison** asked if he had already invested time and resources to pencil this new project at those levels.

**Mr. Robson** stated that over half of the project would be two-bedroom, two-bath flat condominium units, which would be a high density product. The other half would encompass two and three story units.

**Commissioner Harrison** stated that he would let his motion stand.

**Chairperson Weaver** asked if he was not accepting the friendly amendment.

**Commissioner Harrison** replied that he was not, friendly as it was.

IT WAS MOVED (HARRISON/KING) AND CARRIED BY THE FOLLOWING VOTE (7-0-0-0-0) THAT THE PLANNING COMMISSION TAKE NO ACTION ON SITE 1 (PLN2004-00275), SITE 2 (PLN2004-00274) AND SITE 3 (PLN2004-00273);

**AND**

**HOLD SEPARATE PUBLIC HEARINGS FOR SITES 4 AND 5;**

**AND**

**RECOMMEND THAT THE CITY COUNCIL FIND THE INITIAL STUDY HAS EVALUATED THE POTENTIAL FOR THIS PROJECT TO CAUSE AN ADVERSE EFFECT -- EITHER INDIVIDUALLY OR CUMULATIVELY -- ON WILDLIFE RESOURCES. THERE IS NO EVIDENCE THE PROPOSED PROJECT WOULD HAVE ANY POTENTIAL FOR ADVERSE EFFECT ON WILDLIFE RESOURCES ON SITES 4 AND 5;**

**AND**

RECOMMEND THAT THE CITY COUNCIL APPROVE THE MITIGATED NEGATIVE DECLARATION AND FIND IT REFLECTS THE INDEPENDENT JUDGMENT OF THE CITY OF FREMONT ON SITES 4 AND 5;

AND

FIND THAT GENERAL PLAN AMENDMENTS AND THE REZONING TO R-3-15, R-3-18, R-3-23 AND R-3-27 ARE IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S LAND USE AND HOUSING ELEMENT CHAPTERS AS ENUMERATED WITHIN THE STAFF REPORT ON SITES 4 AND 5;

AND

FIND THAT ONCE THE REDESIGNATION AND REZONING IS APPROVED FOR SITES 4 AND 5, THAT WHEN A DEVELOPMENT PROJECT IS PROPOSED ON THESE SITES, SUCH PROJECT WILL BE REQUIRED TO BE EVALUATED INDIVIDUALLY FOR ITS DESIGN AND CONFORMITY TO ADOPTED FREMONT CODES;

AND

MAKE SEPARATE RECOMMENDATIONS FOR EACH OF SITE 4 AND SITE 5 RECOMMENDING THAT THE CITY COUNCIL APPROVE EXHIBITS "A" (GENERAL PLAN AMENDMENTS), AND REZONE THEM TO R-3-15, R-3-18, R-3-23 AND R-3-27 IN CONFORMANCE EXHIBITS "B" (REZONINGS) FOR THE FOLLOWING SITES:

**Site 4** (PLN2004-00251) consists of approximately 1.26 acres located on the northeast corner of Niles Boulevard and Kraftile Road.

IT WAS MOVED (KING/WIECKOWSKI) AND CARRIED BY THE FOLLOWING VOTE (7-1-0-0-0) THAT THE PLANNING COMMISSION:

The motion carried by the following vote:

AYES: 6 – Harrison, King, Lydon, Sharma, Weaver, Wieckowski  
NOES: 1 – Natarajan  
ABSTAIN: 0  
ABSENT: 0  
RECUSE: 0

**Site 5** (PLN2004-00272) consists of approximately 25.29 acres located on the southwest corner of Kato Road and Warm Springs Boulevard.

The motion carried by the following vote:

AYES: 7 – Harrison, King, Lydon, Natarajan, Sharma, Weaver, Wieckowski  
NOES: 0  
ABSTAIN: 0  
ABSENT: 0  
RECUSE: 0

**Item 7. HOUSING ELEMENT PROGRAM 19 – (PLN2004-00112, PLN2004-00279 and PLN2004-00280)** – to consider the following General Plan Amendment and Rezonings:

Site 2 (PLN2004-00279) consists of approximately 30.79 acres on twenty-five (25) properties located on Osgood Road between Washington Boulevard and Blacow Road in the Irvington Planning Area. The proposed project would change the existing General Plan land use designation of Light Industrial to High Density Residential (23 to 27 dwellings per acre) for 41655, 41791, 41868, 41829, 41875, 41911, 41965, the westerly portion of 42000, 42111 and 42183 Osgood Road. Very High Density Residential (27 to 35 dwellings per acre) is proposed for the easterly portion of 42000, 42028, 42088, 42218, 42218, 42270, 42282 and 42536 Osgood Road. A rezoning of the site from the I-L (Light Industrial) district to the R-3-

27, or, alternatively R-3-35 (Multiple Family Residential) District is also proposed, respectively. For 41646, 41688, 41700, 41742, 41753, 41760, 41786 and 41816 Osgood Road, the proposed General Plan land use designation change is to Low Density Residential (5 to 7 dwellings per acre); these addresses proposed for Low Density Residential would have a new zoning designation of R-1-6 (Single Family Residential). A Mitigated Negative Declaration has been prepared and circulated for this project.

**Chairperson Weaver** opened and closed the public hearing, as she had no cards for this site.

**Commissioner Natarajan** asked if there was a reason for not rezoning the I-L parcel within the area proposed for rezoning.

**Deputy Planning Director Schwob** replied that was a site that was more recently developed. However, one of the sites currently under development (with a building in the process of being constructed) was included. Staff spoke with the property owner and he decided that the residential redesignation would be in his best interest in the long run.

Site 3 (PLN2004-00280) consists of approximately 5.72 acres located at 1760 Mowry Avenue at the southwest intersection of Mowry Avenue at Waterside Circle at the Fremont BART Station in the Central Planning Area. The proposed project would change the existing General Plan land use designation of Central Business District and Public Facility to Very High Density Residential (42.5 to 50 dwellings per acre). A rezoning of the site from the CBD (Central Business District) and OS (Open Space District) to the R-3-50 (Multiple Family Residential) District is also proposed. A Mitigated Negative Declaration has been prepared and circulated for this project.

**Chairperson Weaver** opened and closed the public hearing, as she had no cards for this site.

**Commissioner Harrison** stated that he had spoken with a BART Director and he was involved with the downtown plan. He wondered if BART had been notified about these actions, since they were a large stakeholder.

**Senior Planner Livermore** replied that they had been informed and had no objections.

**Deputy Planning Director Schwob** added that extensive outreach to the property owners had been performed and several meetings had been offered to any who were interested. Staff met with those interested parties and spoke with them by telephone. Any objections were noted.

**Commissioner Harrison** expressed concern that parking space at 10:00 a.m. at BART was difficult to find. He did not want this to happen before the new parking at the South Fremont BART station was built.

**Deputy Planning Director Schwob** believed that BART's policy was to not reduce parking at existing BART stations. If they chose to develop this site, they would, most likely, either build a parking structure or decide that the future Warm Springs area would meet the need.

**Commissioner Natarajan** asked if this site was a just portion of the BART parking area. She asked, "What about the rest of the BART station parking?"

**Deputy Planning Director Schwob** replied that she was correct. The remaining portions were designated as public facility, but it was not inconceivable that they will be considered in the future.

**Commissioner Natarajan** asked if this site could be brought back during the next round.

**Deputy Planning Director Schwob** stated that a small chunk of the CBD zoned land was owned by the Alameda County Flood Control Agency and staff planned to bring it back as a clean-up item in the future. BART could be contacted to see if they would be interested in any of their additional lands being redesignated. The CBD plan anticipated 300 units and this site could accommodate 260 units.

**Commissioner Natarajan** agreed and stated that she had planned to recommend his suggestion. She felt that this site would be appropriate for the 50 to 70-unit range and again asked that it come back for reconsideration at a later date. She asked if any other opportunity sites within the CBD had been reconsidered for housing.

**Deputy Planning Director Schwob** understood that no change in policy had occurred since the adoption of the CBD Concept Plan. However, a developer was exploring a mixed-use project within the CBD.

**Commissioner Natarajan** asked if the Planning Commission could recommend that project be considered in the near future.

**Deputy Planning Director Schwob** replied that the Planning Commission could always forward recommendations to the Council. It was up to the Council to decide whether it wished to consider them.

IT WAS MOVED (SHARMA/KING) AND CARRIED BY THE FOLLOWING VOTE (7-0-0-0-0)  
THAT THE PLANNING COMMISSION TAKE NO ACTION ON SITE 1 (PLN2004-00112) TO  
RE-DESIGNATE TWO PARCELS CONSISTING OF APPROXIMATELY 1.51 ACRES OF  
LAND AT 41223 AND 41239 ROBERTS AVENUE;

**AND**

**HOLD PUBLIC HEARINGS ON SITE 2 AND SITE 3;**

**AND**

**RECOMMEND THAT, BASED ON THE INFORMATION CONTAINED IN THE INITIAL STUDY, STAFF REPORT, AND TESTIMONY AT THE PUBLIC HEARING, THE CITY COUNCIL FIND THE INITIAL STUDY HAS EVALUATED THE POTENTIAL FOR THIS PROJECT, AS REGARDS SITE 2 AND SITE 3, TO CAUSE AN ADVERSE EFFECT -- EITHER INDIVIDUALLY OR CUMULATIVELY -- ON WILDLIFE RESOURCES. THERE IS NO EVIDENCE THE PROPOSED PROJECT WOULD HAVE ANY POTENTIAL FOR ADVERSE EFFECT ON WILDLIFE RESOURCES;**

**AND**

**RECOMMEND THAT THE CITY COUNCIL APPROVE A MITIGATED NEGATIVE DECLARATION AND FIND IT REFLECTS THE INDEPENDENT JUDGMENT OF THE CITY OF FREMONT FOR SITE 2 AND SITE 3;**

**AND**

**FIND THAT THE GENERAL PLAN AMENDMENTS, AND THE REZONING TO R-1-6, R-3-27, R-3-35, R-3-50 AND PF DISTRICTS FOR SITE 2 AND SITE 3 ARE IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S LAND USE AND HOUSING ELEMENT CHAPTERS AS ENUMERATED WITHIN THE STAFF REPORT;**

**AND**

**RECOMMEND THAT THE CITY COUNCIL APPROVE PLN2004-00279 AND PLN2004-00280 TO AMEND THE GENERAL PLAN LAND USE DIAGRAM TO DESIGNATE SITES 2 AND 3 WITH THE CHANGED AND/OR ADDITIONAL RESIDENTIAL LAND USE DESIGNATIONS, AND REZONE THEM TO R-1-6, R-3-27, R-3-35 AND R-3-50 AS SHOWN ON THE ATTACHED EXHIBITS.**

IT WAS MOVED (KING/NATARAJAN) AND CARRIED BY THE FOLLOWING VOTE (7-0-0-0-0) THAT THE PLANNING COMMISSION TAKE THE ACTION NOTED BELOW FOR ALL SITES.

The motion carried by the following vote:

AYES: 7 – Harrison, King, Lydon, Natarajan, Sharma, Weaver, Wieckowski

NOES: 0

ABSTAIN: 0

ABSENT: 0

RECUSE: 0

**Item 8. HOUSING ELEMENT PROGRAM 18 – (PLN2004-00265 through PLN2004-00270)** – to consider the following General Plan Amendment and Rezoning.

Site 1 (PLN2004-00266) consists of approximately 2.76 acres located on the southeast corner of Fremont Boulevard and Beard Road in the Northern Plain Planning Area. The proposed project would change the existing General Plan land use designation of Medium Density Residential (6.5 to 10 dwellings per acre) and Gateway to Medium Density Residential (18 to 23 dwellings per acre) and Gateway. A rezoning of the site from the R-1-6 (Single Family Residential, 6,000 sq. ft. lot size) district to the R-3-23 (Multiple Family Residential) District is also proposed. A Mitigated Negative Declaration has been prepared and circulated for this project.

**Chairperson Weaver** opened the public hearing.

**Dennis Dubro**, representing Congregations Organizing for Renewal (COR), stated that his organization represented 4,000 families in the City of Fremont and 25,000 families in southern Alameda County and affordable housing was a very deep, very dear concern. When the economy turned up, he expected that renters would be asked to pay higher rents or would be forced to move out. He was advocating for all types of housing, including market rate housing, as the supply needed to be increased. Addressing Item 8 in general, he thanked the City and staff for their work and encouraged everyone to do what they could to increase the housing supply within the city in a way that was meaningful and balanced.

**Chairperson Weaver** closed the public hearing.

**Commissioner Sharma** also reminded the public that the city's teachers, firefighters and policemen could not afford half-million dollar houses and higher density housing would allow some of them to buy their own homes and to contribute to a better and more vibrant community.

**Commissioner Harrison** asked if mixed use would be appropriate for this site.

**Senior Planner Livermore** agreed that mixed use could be possible here within a three story building on Fremont Boulevard under the R-3 designation. It just depended on the economy. Staff had spoken to the property owner about it.

**Commissioner Natarajan** asked what would happen if no project came in at the higher density range; would it have to go through a General Plan Amendment to bring it back to a lower density.

**Deputy Planning Director Schwob** replied that the answer was "Yes" and "No." If the City had sufficient sites designated to meet its regional housing need, it could be designated at a lower density. However, the City was precluded from making downward density changes if it did not have a sufficient supply of sites. The answer is "No" at this time, but could be "Yes" at a future date.



IT WAS MOVED (KING/NATARAJAN) AND CARRIED BY THE FOLLOWING VOTE (7-0-0-0-0) THAT THE PLANNING COMMISSION TAKE THE ACTION NOTED BELOW FOR ALL SITES.

Site 4 (PLN2004-00270) consists of approximately 5.41 acres of land located in five separate parcels on the southwest corner of Mission Boulevard and Mowry Avenue in the Central Planning Area. The proposed project would amend the General Plan land use designation of Low Density Residential (5 to 7 dwellings per acre) and Foot Trail to Medium Density Residential (15 to 18 dwellings per acre) and Foot Trail. A rezoning of the site from the R-1-6 (Single Family Residential, 6,000 sq. ft. lot size) district to the R-3-18 (Multiple Family Residential) District is also proposed for the Site and the adjacent parcel immediately to the south of the Site. A Mitigated Negative Declaration has been prepared and circulated for this project.

**Chairperson Weaver** opened and closed the public hearing, as she had no cards for this site.

**Commissioner Harrison** asked if this was the site of the Pin Brothers project on Mission Boulevard.

**Deputy Planning Director Schwob** replied yes, that it was the southernmost parcel on the aerial map. The Pin Brothers sold that parcel to another developer, so the Commission's action was to just rezone it, as it was already designated for 15 to 18 units. The other parcels to the north were proposed to be redesignated and rezoned.

**Commissioner Natarajan** asked why the report stated that this site's density had been reduced from the higher density staff originally proposed.

**Deputy Planning Director Schwob** replied that the adjacent landowners had objected to the higher density. It could always come back sometime in the future for reconsideration of a higher density.

**Commissioner Sharma** complimented staff for taking care of the neighbor's concern. He agreed with lowering the density in this instance.

IT WAS MOVED (KING/WIECKOWSKI) AND CARRIED BY THE FOLLOWING VOTE (7-0-0-0-0) THAT THE PLANNING COMMISSION TAKE THE ACTION NOTED BELOW FOR ALL SITES.

Site 5 (PLN2004-00267) consists of approximately 14 acres of land located on the northeast corner of Walnut Avenue and Guardino Avenue in the Central Planning area. The proposed project would amend the General Plan land use designation of Medium Density Residential (15-18 dwellings per acre) to High Density Residential (27 - 35 dwellings per acre). A rezoning of the site from the P-94-2 (Planned District) to the P-2004-267 (Planned District) is also proposed. A Mitigated Negative Declaration has been prepared and circulated for this project.

**Chairperson Weaver** opened the public hearing.

**Joan Matlack** stated that she was concerned specifically about this site, because she worried about more traffic and crime and everything else that was mentioned at the last meeting. She was not against low income housing; she was concerned about families being crammed into little spaces. She expressed concern about being unable to challenge land use decisions, as she had not received any prior notice.

**Chairperson Weaver** stated that any item before the Planning Commission could always be appealed to the City Council.

**Chairperson Weaver** closed the public hearing

**Commissioner King** assumed that if the speaker had not received a notice then none of her neighbors had received notices, either. He was uncomfortable voting on an item that had not been noticed.

**Chairperson Weaver** asked Ms. Matlack if she had received notice of this meeting.

**Ms. Matlack** stated that she meant that she did not remember receiving a notice about the first time it was heard. She noted that the memo stated that the State could not be challenged, because it had already gone through.

**Chairperson Weaver** explained that she was talking about “apples and oranges” and the Housing Element, which she was referring to, did not notice the general public other than when it went through the process. A number of newspaper articles had been written about it and the process. When specific properties were being considered, notices were then sent out. She understood that all noticing requirements had been met.

**Ms. Matlack** recalled that discussion had occurred at the last meeting about challenging the state about how it had come up with the City’s housing units number. The memo stated that a challenge could not be made.

**Senior Deputy City Attorney Seto** reiterated her description made at the beginning of the meeting of how the process worked and why the City had accepted the housing unit numbers. She realized that the process was difficult and convoluted, so that the layperson probably was not clear about it when reading about it in the newspaper.

**Commissioner King** complemented Senior Deputy City Attorney Seto on her excellent memo, as he had asked for the memo to get down in writing the City’s position. It bothered him that the housing element had never been challenged in court by any city. He asked if the City of Palo Alto had to struggle with a specific number housing units that they had to provide.

**Senior Deputy City Attorney Seto** replied that the City of Palo Alto did, along with every city and county in the state. She noted that the Commissioners had been provided with the units mandated to every city within Alameda and Santa Clara Counties. The State had the right to simply mandate these numbers.

**Commissioner Sharma** stated that it seemed that if the City of Fremont did not have to provide as many housing units as, say, Milpitas, then the City was not overcrowded.

**Senior Deputy City Attorney Seto** stated that he was correct, because the City of Fremont was more than three times larger than the City of Milpitas, but it was being asked to provide 7,000 units compared to the 4,000 units mandated for Milpitas.

**Commissioner King** noted that a petition had been received from the residents of this area who opposed the rezoning of this site. He wondered if all of the residents in this area were opposed and, if not, what was the percentage of residents that this petition represented.

**Deputy Planning Director Schwob** stated that the petition had been signed by 38 people, which was a small percentage if one supposed that two people in each household had signed the petition. That would be just 16 households.

**Commissioner King** asked if there were any more speakers for this item.

**Chairperson Weaver** replied that there were not.

**Senior Planner Livermore** added that 937 notices were sent for this site.

**Vice-Chairperson Wieckowski** stated that he had received quite a few letters from individuals who were concerned about the City destroying the only farmland left within the city. He asked if staff had considered rezoning this site to agriculture and why it was before the Commission now.

**Deputy Planning Director Schwob** replied that rezoning this site to agriculture or park was not considered because, typically, an acquisition would be required. He used Ardenwood as an example where the East Bay Regional Parks managed it. This site was already zoned for 11 to 15 units. This action also absorbs a density transfer from the adjoining parcel and would add about 130 more units to the 301 it could already accommodate. It was ultimately the property owner who chose how to use the land use within the framework of the City's General Plan and Zoning.

**Vice-Chairperson Wieckowski** asked if that density bonus could be transferred to another parcel or did it have to be attached to this site.

**Deputy Planning Director Schwob** answered that it had to attach to this specific site.

**Commissioner Harrison** recalled that one of the speakers at the last meeting stated that the owner did plan to develop this site. He assumed that he supported this motion but planned to operate the farm for some time.

**Senior Planner Livermore** replied that staff spoke with the property's representative and they had no objections. It was certainly up to the owner as to how he used the property.

**Commissioner Lydon** recalled that one of the concerns about this site was parking. He asked if staff had any comforting words to offer the neighbors regarding the parking.

**Deputy Planning Director Schwob** stated that when and if a proposal was received on this site, it would have to conform to current parking standards. Property owners within 300 feet of this parcel would be notified and would have the opportunity to participate in the process. Developers were usually asked to hold a neighborhood meeting prior to coming to the Commission so that they could ask questions and become more comfortable with what was being proposed. The parking problem could be caused by many situations: perhaps cars associated with several units parked on the street at the same time; or perhaps they chose to use street parking over using their garages; or overflow parking from BART could be the cause. The residents may request code enforcement review to see if illegal parking was going on.

**Commissioner Natarajan** asked if the transferred units were on the top of the 27 to 35 units per acre or were they absorbed within that designation.

**Deputy Planning Director Schwob** replied that they were absorbed within it at this point, so the density transfer would no longer exist after this designation was put into place.

**Commissioner Natarajan** asked if a lower density was actually being considered with the additional units being absorbed. She asked if this was one of the parcels that had a higher density and was downzoned with the rest of the parcels in that area.

**Deputy Planning Director Schwob** stated that the density would be higher, overall, as it would allow for an additional 130 units on top of what could currently be constructed there.

This was the receptor of the density from the downzoned parcels in the area. He did not believe this parcel had been downzoned.

IT WAS MOVED (WIECKOWSKI/KING) AND CARRIED BY THE FOLLOWING VOTE (7-0-0-0-0) THAT THE PLANNING COMMISSION TAKE NO ACTION ON SITE 2 (PLN2004-00265) THREE PARCELS ON THE SOUTHWEST OR “ BAY SIDE OF FREMONT, NORTHWEST OF FREMONT BOULEVARD AND FERRY LANE); SITE 3 (PLN2004-00268) APPROXIMATELY 12.75 ACRES OF LAND LOCATED ON THE NORTHWEST CORNER OF FREMONT BOULEVARD BETWEEN DECOTO ROAD AND FERRY LANE; AND SITE 6 (PLN2004-00269) APPROXIMATELY 3.97 ACRES LOCATED ON THE SOUTH SIDE OF PERALTA BOULEVARD AND ACACIA AVENUE;

**AND**

**HOLD SEPARATE PUBLIC HEARINGS ON SITES 1, 4 AND 5;**

**AND**

**RECOMMEND TO THE CITY COUNCIL THAT THE INITIAL STUDY CONDUCTED FOR SITES 1, 4 AND 5 PLNS 2004-00266, 2004-00267, 2004-00270 (AND EXCLUDING SITES 2, 3 AND 6 PLNS 2004-00265, 2004-00268 AND 2004-00269) HAS EVALUATED THE POTENTIAL IMPACTS FOR PROGRAM 18 REDESIGNATIONS AND REZONINGS THAT COULD CAUSE AN ADVERSE EFFECT, EITHER INDIVIDUALLY OR CUMULATIVELY, ON WILDLIFE RESOURCES, AND FIND THAT THERE IS NO EVIDENCE THE PROJECT WOULD HAVE ANY POTENTIAL ADVERSE EFFECT ON WILDLIFE RESOURCES;**

**AND**

**RECOMMEND TO THE CITY COUNCIL THE ADOPTION OF DRAFT MITIGATED NEGATIVE DECLARATION FOR SITES 1, 4 AND 5 PLNS 2004-00266, 2004-00267, 2004-00270 (AND EXCLUDING SITES 2, 3 AND 6 PLNS 2004-00265, 2004-00268 AND 2004-00269), WITH ACCOMPANYING CERTIFICATE OF FEE EXEMPTION FINDING THAT IT REFLECTS THE INDEPENDENT JUDGEMENT OF THE CITY OF FREMONT, AND FINDING THAT THERE IS NO SUBSTANTIAL EVIDENCE THAT THE PROJECT, AS MITIGATED, WILL HAVE A SIGNIFICANT IMPACT ON THE ENVIRONMENT;**

**AND**

**FIND THAT GENERAL PLAN AMENDMENTS, THE REZONING TO R-3-18, R-3-23 AND PLANNED DISTRICT (P-2004-267) FOR STIES 1, 4 AND 5 ARE IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S LAND USE AND HOUSING ELEMENT CHAPTERS AS ENUMERATED WITHIN THE STAFF REPORT;**

**AND**

**FIND THAT THE EXISTING VACANT SITE CURRENTLY USED AS A FARM HAS RELATIVELY UNIQUE FEATURES AND THAT ITS DESIGNATION FOR HIGHER DENSITY RESIDENTIAL DEVELOPMENT REQUIRES SPECIFIC DESIGN CONSIDERATIONS TO ACHIEVE THESE OBJECTIVES; AND IS IDENTIFIED IN THE HOUSING ELEMENT SUCH THAT THE PROPERTY CAN BEST BE DEVELOPED AS A PLANNED DISTRICT FOR SITE 5;**

**AND**

**MAKE SEPARATE RECOMMENDATIONS FOR EACH SITE RECOMMENDING THAT THE CITY COUNCIL APPROVE EXHIBITS “A” (GENERAL PLAN AMENDMENTS), EXHIBITS “B” (REZONINGS), AND EXHIBIT “D” FOR THE PLANNED DISTRICT (P-2004-267) FOR THE FOLLOWING SITES:**

**SITE 1** (PLN2004-00266) approximately 2.76 acres located on the southeast corner of Fremont Boulevard and Beard Road,

**SITE 4** (PLN2004-00270) approximately 5.41 acres of land located in five separate parcels on the southwest corner of Mission Boulevard and Mowry Avenue,

**AND SITE 5** (PLN2004-00267) approximately 14 acres of land located on the northeast corner of Walnut Avenue and Guardino Avenue.

**Chairperson Weaver** called for a ten-minute recess at 8:15 p.m.

**Chairperson Weaver** called the meeting back to order at 8:25 p.m.

## **CONSENT CALENDAR**

THE CONSENT LIST CONSISTED OF ITEM NUMBERS 1, 2, AND 3.

**Commissioner Natarajan** asked that a separate vote be taken on Item Number 1, because she worked with the consulting firm that worked on this project.

IT WAS MOVED (HARRISON/KING) AND CARRIED BY THE FOLLOWING VOTE (6-0-1-0-0) THAT THE PLANNING COMMISSION TAKE THE FOLLOWING ACTION ON ITEM NUMBER 1

**Item 1. PACIFIC COMMONS MAJOR RETAIL DEVELOPMENT – (MIS2004-00399)** – to consider a Planned Sign Program for the Major Retail District within the area referred to as Pacific Commons. This project is categorically exempt from review under CEQA pursuant to Section 15311(a) (Accessory Structures).

**HOLD PUBLIC HEARING;**

**AND**

**FIND MIS2004-00399 IS CATEGORICALLY EXCEPT FROM ENVIRONMENTAL REVIEW PER CEQA SECTION 15311(A), ACCESSORY STRUCTURES;**

**AND**

**FIND THAT THE PROPOSED PROJECT IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S LAND USE AND LOCAL ECONOMY CHAPTERS AS ENUMERATED WITHIN THE STAFF REPORT;**

**AND**

**APPROVE MIS2004-00399, AS SHOWN ON EXHIBIT "A", SUBJECT TO FINDINGS AND CONDITIONS CONTAINED IN EXHIBIT "B" AND EXHIBIT "C".**

The motion carried by the following vote:

AYES: 7 – Harrison, King, Lydon, Sharma, Weaver, Wieckowski

NOES: 0

ABSTAIN: 0

ABSENT: 0

RECUSE: 1– Natarajan

IT WAS MOVED (WIECKOWSKI/HARRISON) AND UNANIMOUSLY CARRIED BY ALL PRESENT THAT THE PLANNING COMMISSION TAKE THE FOLLOWING ACTIONS ON ITEM NUMBERS 2 AND 3.

**Item 2. ALAMEDA RESIDENCE – Clara Terrace – (PLN2004-00214)** – to consider a Planned District minor amendment and a Preliminary Grading Plan for an 8,064 square foot residence, including a detached garage, located in the Mission San Jose Planning Area. A Mitigated Negative Declaration has been previously prepared and adopted for the Planned District subdivision, which includes the anticipated development of this lot. (Continued from June 10, 2004)

**CONTINUE TO JULY 8, 2004.**

- Item 3.     BAJA FRESH – 3720 Mowry Avenue – (PLN2004-00283)** - to consider a Finding for Site Plan and Architectural approval for a remodel of an existing restaurant building located in the Central Planning Area. This project is categorically exempt from review under CEQA pursuant to Section 15301. (Existing Facilities)

**HOLD PUBLIC HEARING;**

**AND**

**FIND PLN2004-00283, AS PER EXHIBIT “A” (SITE PLAN & ELEVATIONS) IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY’S EXISTING GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN’S LAND USE CHAPTER AS ENUMERATED WITHIN THE STAFF REPORT. THE PROJECT CONFORMS TO THE GOALS AND OBJECTIVES OF THE CENTRAL BUSINESS DISTRICT;**

**AND**

**FIND PLN2004-00283 IS CATEGORICALLY EXEMPT FROM FURTHER ENVIRONMENTAL REVIEW PURSUANT TO CEQA GUIDELINES SECTION 15301 RELATED TO ALTERATIONS TO EXISTING FACILITIES;**

**AND**

**APPROVE PLN2004-00283, AS SHOWN ON EXHIBIT “A” AND SUBJECT TO FINDINGS AND CONDITIONS ON EXHIBIT “B”.**

The motion carried by the following vote:

AYES:       7 – Harrison, King, Lydon, Natarajan, Sharma, Weaver, Wieckowski  
NOES:       0  
ABSTAIN:   0  
ABSENT:    0  
RECUSE:    0

**Commissioner Harrison** commented that he had driven by this location many times with his father, who always asked who was moving into the building. Now, he could tell his father and he would be happy.

## **PUBLIC COMMUNICATIONS**

### **ORAL COMMUNICATIONS**

**Lona Gordon** stated that she lived in the mobile home behind the school property where the vandal watch was located. The school district wanted to put a new multipurpose building, along with two other portables in this location. She wanted to know about rezoning and if she could move her home somewhere else on the site. She owned the home and the District owned the land.

**Planning Director Meeker** suggested that she contact him or Deputy Planning Director Schwob. One of them could point her in the right direction.

## **PUBLIC HEARING ITEMS**

**Items 4 and 5 were heard together.**

- Item 4.     HILL AREA INITIATIVE ZONING TEXT AMENDMENTS (ZTA) - Citywide - (PLN2004-00029)** - to consider a Zoning Text Amendment modifying regulations for the O-S (Open Space) Districts, P-F (Public Facilities), P-D (Planned District) and other zoning regulations (definitions and development standards), and the Development Policy for the Hill Area to implement the General Plan Amendment enacted by the Hill Initiative of 2002

(Measure T). This item will also delete the (R) Development Reserve Overlay District and the Ridgeline Open Space District as they are being superceded by other zoning regulations to implement Measure T. A Mitigated Negative Declaration has been prepared and circulated for this project.

**MODIFICATION TO STAFF REPORT:** *On page 2, second paragraph, the third sentence which reads ~~"The Development Reserve Overlay District (Article 18.7 is proposed for elimination because the Hill Area Initiative [of 2002] eliminated the General Plan designation of Development Reserve, which was the basis for creating this zoning district."~~ should be deleted. While the Hill Initiative of 2002 eliminated the need for the Development Reserve Overlay above the proposed "Toe of the Hill" (TOH) line, the Hill Area Initiative of 1981 is still applicable and there are some areas located below the new TOH line that are still affected by the provisions of the 1981 Initiative and Development Reserve provisions. Staff will return with an item that proposes incorporation of the relevant remaining provisions of the Development Reserve at a later date. In the interim, it is recommended that the provisions be retained. Therefore, it is also recommended that the Commission not recommend that Exhibit A-13 (Development Reserve Overlay District) be eliminated.*

*In Exhibit A-1, section 4, insert "including the definition of the Toe of the Hill" after "2002".*

*In "Hill Face Open Space Land Uses" on page 4, under "Proposed accessory uses", add "secondary dwelling units pursuant to the area limitations of the 2002 Hill Initiative".*

*In Exhibit A-3, section b (Accessory uses), is reordered and amended to include Secondary Dwelling Units as follows:*

- (1) ~~Home occupations, in principal dwelling unit only. Packing, processing, storage or sale of agricultural produce or plants, a substantial portion of which were grown in the Hill Area providing, however, the operation of such uses shall be secondary to that of the primary agricultural use of the lot; providing further that the above uses shall not include the commercial feeding of garbage or offal to swine or other animals;~~*
- (2) Rooming and boarding of not more than two persons;*
- (3) Secondary dwellings units<sup>3</sup>, pursuant to the area limitations of the 2002 Hill Initiative;*
- (4) Signs complying with the applicable regulations set forth in Article 21 of this chapter."*

*In Exhibits A-12 a, b, and c: add "Planned District Regulations" to Exhibit titles after "Zoning Text Amendment" on a separate line.*

*Amend Exhibit A-12-a, section (m) to reflect the recently introduced Mixed Use Ordinance. The new text will read "Mixed use development. Mixed use developments, subject to the provisions set forth in Article 21.3 of this chapter, may consist of one or more parcels developed as a cohesive project and design with a blend of various compatible uses such as commercial, residential and institutional.*

- (1) Central Business District: Mixed-use developments combining commercial and residential land uses may be permitted, subject to the following requirements:*
  - a. Mixed use developments in the C-B-D shall be processed with a planned district application.*
  - b. Mixed use developments shall be guided by the Central Business District Concept Plan.*

*Mixed use developments shall incorporate housing for low-income households in keeping with the requirements of the General Plan for mixed-use developments in the C-B-D."*

- Item 5. HILL AREA GENERAL PLAN AND ZONING CHANGES - Citywide - (PLN2004-00030)** - to consider General Plan land use map changes and rezonings for various parcels in the Hill Area and along the base of the hills to: (1) delete Development Reserve Overlay (D.R.O.) line from the zoning map, (2) rezone parcels from R-1-80 and R-1-160 (Single-Family Residential Districts) to O-S (Open Space District) and (3) rezone all or portions of properties located above along the base of the Toe of the Hill line from R-1 (Single-Family Residential) and A (Agricultural) Districts to O-S (Open Space) Districts to reflect changes in the alignment of the Toe of the Hill line, in order to implement the Hill Initiative of 2002 (Measure T). A Mitigated Negative Declaration has been prepared and circulated for this project.

**MODIFICATION TO STAFF REPORT**— *On page 4, in the “General Plan Land Use Map and Zoning Map Changes” section, add as the last paragraph: “A small addition to the Land Use Element text is recommended. The 11”X17” map (included in your packets as an “Informational” item) entitled “Extent of Lands Affected by the 2002 Hill Area Initiative” is proposed for inclusion within the Hill Planning Area section of the General Plan Land Use Element as “Figure 3-3a”. This figure is proposed to be located on page 3-24-1 and referenced with the inclusion of the following text: “(See Figure 3-3a)” after the second paragraph under the heading “Projections”.*

**Chairperson Weaver** announced that Items 4 and 5 would be heard together, but would be voted upon separately. Speakers would have two minutes each to speak as there were many people who wished to speak and no new item could be taken after 11:00 p.m.

**Deputy Planning Director Schwob** stated that he and City Engineer Hughes would make the presentation, which would focus on the Toe of the Hill line, along with proposed zoning and planning changes and staff's recommendations. The original hill initiative (Measure A) was passed by voters in 1981. The most recent hill initiative (Measure T) was passed in 2002. Both measures were the current and binding law of the land. The zoning ordinance was previously amended to include all of the requirements of Measure A and now staff was proposing another amendment to incorporate the provisions of Measure T.

**City Engineer Hughes** stated that Measure A established a definition for the toe of the hill and read that definition. Measure T deliberately changed the definition because of problems with implementing the toe of the hill. The main change was that it redefined the toe of the hill which is along the base of the hills where the natural grade first becomes 20 percent or more. He noted that creating the line was more complicated considering the topography in the Fremont hills. The first point that the 20 percent grade occurred from the west would be the toe of the hill, not the second 20 percent slope further up the hill. Under Measure A, drawing the line encountered difficulties, such as, how to draw across ridges and creeks, how to connect discontinuous lines and pockets. Measure T was adopted to clarify the issue of creating a line at the first toe of the hill or the first 20 percent line.

**City Engineer Hughes** continued by stating that it did not deal with the other complexities of the Fremont hill topography. Therefore, staff was proposing the use of some principles that would help to define that line. An aerial topography was created in the spring of 2002 to use for the graphic information system. Five-foot contours were created in the hills, which made a very accurate topographic map for the entire hill area. A map was created by the same consultants who used 40-foot sized areas over the entire hill area and calculated slopes across those points based on the contours already created. Through computer generation, the consultants identified the location of the 20 percent grade break change, which created another map that was very complex. The Measure T definition required that a continuous line be created to define the toe of the hill. Small gaps and small fingers that projected out of small landforms were noted and the line was drawn across gaps and fingers less than 100 feet to slightly smooth the line. Anything less than 100 feet would not be wide enough to develop up into. A small creek or other land feature would not be felt as a visible feature,



whether it was a change in the toe of the hill or the face of the hill. In southern Fremont it was decided to connect these somewhat disparate lines by drawing along the top of the 20 percent line, because it did not seem practical to include properties that were in areas flatter than 20 percent.

**Deputy Planning Director Schwob** continued with explaining the notable differences between Measure A and Measure T. Measure T's purpose was to expand upon Measure A's purpose by including protection of the natural resources, watersheds, water quality, wildlife habitat, scenic views, urban sprawl, traffic congestion and water pollution in the hills, along with riparian, steep ridge line protection. Measure A restricted development to one residence for each 5 or 10-acre lot, some 20-acre minimum lots were required. Development was not permitted where the slope was a 30 percent grade or more. The minimum lot area under Measure T is now a uniform 20 acres with one residence allowed. In areas that might be annexed in the future, the minimum lot size was 100 acres. Owners of legally created lots prior to Measure T were allowed to develop a single-family residence, as well as secondary dwelling units authorized by State law. Under Measure T, uses that would be allowed include agriculture, small scale, low intensity rearing, custodianship, training or care of animals and limited commercial and institutional uses that served the hill are residences and other government and public facilities with limitations.

**Deputy Planning Director Schwob** continued by stating that Measure T would require clustering, when feasible, to bring the development down the hills to make it less visible from public places. The Visual Safeguards section was an important part of Measure T and was very different from Measure A. Heights of 35 feet would be allowed by Measure T but staff was proposing to keep heights at the historical City standard of 30 feet. Many zoning districts would be amended. He gave the definitions of the many designations. Longstanding City policy was to require Planning Commission review for homes over 7,500 square feet or accessory structures over 600 square feet. He noted that this provision was proposed for codification along with the other Measure T provisions. Planned districts also set forth differing requirements for their communities. Existing planned district zones would not change, however, new or expanded homes must minimize visibility from public places. Another part of the amendment would address some unique uses in the hill area, such as animal feed lots, including pig farms. If an existing structure were destroyed by force majeure, it could be rebuilt in kind. If it was added onto or expanded in any way, it would need to follow the regular Measure T rules and procedures. Additions and structures under 7,500 square feet and accessory structures under 600 square feet would have to undergo staff review, who would use the same criteria as the Planning Commission would use when reviewing proposal. Staff would retain the right to refer matters to the Planning Commission.

**Commissioner Harrison** asked if the applicant also had the right to refer to the Planning Commission.

**Deputy Planning Director Schwob** stated that, yes, the applicant could appeal staff's decision to the Planning Commission. In some cases the new toe of the hill had moved up the hill because the old toe of the hill had been based upon a much less refined topographic map. Some areas were still above the water pressure zone or "Development Reserve Overlay" (DRO). He noted that the DRO would come back to the Commission, along with priorities concerning the city's wireless telecommunications ordinance. The City used two maps: a land use map that was part of the General plan and a zoning map that precisely showed the zoning districts. The zoning districts and land use designations were no longer consistent with Measure T and this amendment would make them consistent. The properties with changed land use designations in the General Plan would still retain their planned district zoning regulations.

**Planning Director Meeker** announced that he would pass a summary of the meeting notes, prepared by the Avalon Homeowner's Association taken during their Toe of the Hill Strategy Meeting held on June 21<sup>st</sup> at the Warm Springs Community Center.

**Chairperson Weaver** opened the public hearing and read a letter from Mr. Walker that stated that he believed the proposed action constituted an unlawful taking of his property, it was inverse condemnation, it violated his rights to due process and it denied him full and equal protection of the laws. It was "abusive discretion, arbitrary and capricious and was contrary to law."

**Susan Stone** declined to speak.

**Commissioner King** disclosed that he had spoken with the next speaker by telephone and had received the email from him that was included in the Commissioners' packets.

**James Gearhart** stated that his dream came true when Measure T was passed (his dream was not an individual mansion on the ridge line). The protection that Measure T provided could only be modified by the voters, rather than "transient council members, as city-elected and non-elected come and go." The city's laws must be treated with respect and those trying to change the laws for greed or self interest must not be allowed.

**Commissioner King** asked if the speaker had been for or against the proposal that was before the Commission.

**Mr. Gearhart** replied that he was a friend of the Hill Area Initiative.

**Shanker Munshani**, Avalon homeowner, thanked staff for the detailed report. The computer would print out only what it was told and he asked that the Commission not be impressed by all the technology that was used. He pointed out the area (Avalon) that was in contention at this meeting.

**Don Olson**, Avalon homeowner, stated that he was also an environmentalist and he supported the Avalon community concerning the redrawing of the Toe of the Hill line to below the community.

**Marcile Miller**, Avalon homeowner, read from the California Election Code and noted that the City website had just provided Measure T information two years after its election. She read the definition from the "impartial analysis" section of the voter pamphlet.

**Commissioner King** asked the speaker if she was for or against the decision that the Commission was being asked to make.

**Ms. Miller** replied that she was against.

**Thuong Vu Nguyen**, Avalon Homeowner, asked that the Avalon community be excluded from the area above the toe of the hill. She stated that after living in Santa Clara County for 20 years, she decided to move to beautiful Fremont. She voted for Measure T, because it was supposed to preserve the open space of the Fremont hills. However, open space meant open space, not several hundreds of homes visited by several thousand people. This amendment would be a detriment and a hardship for all the people living there. It was unfair, it was cruel and it was against all of the basic principals of the law governing the country.

**Betsy Yamasaki**, Avalon resident, stated that she had given a copy of her comments and some pictures to staff. She stated that the Avalon developer filed a lawsuit against the City in 1991, to build homes in the Warm Springs area. In her opinion, the City settled with the developer because the judge would have ruled against the City. The land above Avalon,

encompassing 1,100 acres, was given to the City by the developer to “preserve and maintain the property as open space land, to protect and preserve the scenic open space and aesthetic values and characteristics of the property.” The City was now going back on its agreement with the developer to allow Avalon to be zoned residential and trying to redraw the line to put Avalon back into open space. In her opinion, Measure T had a hidden purpose, which was to retaliate against the developer for building Avalon. She did not believe that changing the location of the community relative to the toe of the hill would protect the hills from harmful and unnecessary development.

**Commissioner King** complimented the speaker on her impressive paper. He asked her why she had read it, since all of the Commissioners had a copy.

**Ms. Yamasaki** replied that she did not want to misquote anything.

**Commissioner King** asked if she believed that if Measure T had been in existence in 1991 that the judge’s decision would have been the same.

**Ms. Yamasaki** stated that she had been told that the judge’s decision would have been the same, regardless of that the City did.

**Commissioner King** reminded her that was because Measure T was not in existence. However, no one knew what the judge’s decision would have been because he did not make a ruling.

**Ms. Yamasaki** agreed. She threatened that Avalon would take this matter to court, if they had to.

**Commissioner King** replied that he was in favor of exempting Avalon, but he was being talked out of it, because her attitude had been so antagonistic and because she had hinted that staff had been lying, when they had not. She had made a valid point, but her belligerence made it hard to agree with her.

**Ms. Yamasaki** stated that she had heard his comments. However, Avalon had been fighting the same battles for six years and the community was getting tired. Perhaps, her attitude was a little bit stronger than it should have been.

**Bert Hashemi and Yasamin Karimi – Mr. Hashemi spoke –** He thanked Ms. Yamasaki for her strong comments, as he related to them as an Avalon homeowner. Dr. Vu had expressed his thoughts very clearly. He loved the City, the hills and Measure T. However, he asked how the City could ignore the residents of Avalon who paid high taxes and contributed to the City. The residents did not want to fight with the City, they wished to be friends. He asked that Ms. Yamasaki’s frustration not override the Commission’s consideration for the 2,000 hard working people in the Avalon community who just wanted a better life there.

**Jack Balch**, Vargas Road resident, stated that Measure T would not allow him to put up a fence, since he was within 200 of a riparian area. His home could be seen from I-680 and he had power poles nearby and an over the slope easement. He asked if this interpretation would be written or would someone in the future reinterpret this Measure. He questioned whether his home (or other homes within 200 feet of a riparian creek) could be rebuilt if it was destroyed and if he could rebuild his barn and fences. He also questioned the City’s liability.

**Commissioner Harrison** asked staff to address the issue of the fence.

**Deputy Planning Director Schwob** replied that Measure T did not preclude structures from being built, but it required that they must be minimized when viewed from public places (they did not have to be invisible). He believed that a fence would be acceptable.

**Commissioner Lydon** asked if the speaker could replace a building if it was destroyed.

**Senior Deputy City Attorney Seto** replied that Measure T was silent on that issue. However, staff's proposed zoning text amendment proposed that, in case of disaster, the owner would be allowed to rebuild their structure to the former footprint and the same floor size. If the structure was to be larger, the owner would have to go through the permit process to obtain approval.

**Chairperson Weaver** asked the Commission to hold their questions for staff until all of the public speakers had been heard.

**Commissioner Sharma** asked if an owner of a destroyed building could rebuild in a different location on his property.

**Senior Deputy City Attorney Seto** replied that it would have to be evaluated in terms of Measure T (i.e., visibility, siting on constrained areas, access issues).

**Special Assistant Len Banda** added that most fences did not require a building permit unless they were over six feet high, so a normal agricultural fence would be allowed.

**Mr. Balch** noted that Measure T allowed nothing to be built within a riparian creek. He asked if his fence could be approved at the staff level. He stated that he had more concerns that he was not able to mention, but they were all in his letter.

**Chairperson Weaver** asked staff to make a note of his question. She told the speaker they would respond later in the meeting to his questions and that she had given his letter to staff.

**Shawna Dean Bateman**, attorney, stated that she believed that Measure T, as it applied to Section 4C, was illegal, because existing residential districts could not be designated as Hill Open Space. She stated that Section 2J, Government Code Section 65560b stated that open space was substantially undeveloped. Under Evidence Code 6695C3, the burden of proof would be for the City to show that there would be substantial government interest that cannot be achieved without the rezoning. She asked how rezoning existing residences achieved any government interest. She believed that Measure T (as applied to her and her neighbors) was illegal and violated Federal and State law under the Fifth Amendment, because it was an illegal taking without just compensation, as she believed that home values could decrease because some lots would be zoned both residential and open space. Two neighbors would be treated differently, which was also illegal under State and Federal law. She quoted a legal opinion, which proved this action was illegal. She believed that Measure T would not allow her to use sprinklers on (or landscape) the portion of her lot that was a slope of more than 30 percent.

**Bhaskar Chadalavada** stated that he did not wish to speak.

**Steven Delucchi**, representing the Louie Family Trust, stated that they owned over 1,000 acres in the Niles hills, which included the Niles Sign. Prior to Measure T, the property could have accommodated 250 dwelling units; because of Measure T, now 50 units would be allowed. Developable property would be taken away when one of the "fingers" was crossed by the Toe of the Hill boundary and relocated above the line. He asked that this particular finger of land remain below the Toe of the Hill.

**Susan Gearhart**, resident since 1976, stated that she had worked very hard for the 1981 initiative and was saddened when homes were allowed to build on the 20 percent grade in the hills. Measure T was created to avoid more development in the hills; it had nothing to do with anything else. The Toe of the Hill was drawn at the 20 percent grade, because the 1981 initiative did not state where the 20 percent grade started. If parcels of land were cut around, implied that there were favorites. She agreed that the Toe of the Hill should be drawn based on principles that could be defensible in court. If owners of homes above the Toe of the Hill wanted to increase their size, they should be under the same visual safeguards and environmental concerns.

**Mike Douglas**, Mission Street property owner, stated that his property was near the Alameda County Water ponds and asked if this hearing would affect his ability to create residential and commercial development on his property for his children's future.

**Deputy Planning Director Schwob** replied that staff would look at the map to ascertain if his property would be affected.

**David Cheng**, Avalon Community resident, stated that he was not a lawyer or civil engineer. He feared that he would not be allowed to build a play area for his children, although it would not affect the environment. He stated that his home certainly was not "an open space."

**Dr. Herman Suryoutomo**, Avalon resident and an engineer, stated that he was active in many charitable organizations in the City and the Bay Area. He had supported Measure T and had understood that it would prevent new development in the hills. His residence would be rezoned to open space and believed it would negatively affect the value of his home. He believed that the Toe of the Hill demarcation was arbitrary and should be changed.

**Commissioner King** asked that staff explain why Avalon Heights could not be exempted. He thought some time might be saved, if staff could address some of the speakers' issues. He agreed with a previous speaker that, if this issue went to court, the Avalon homeowners would prevail.

**Chairperson Weaver** announced that the rest of the speakers would be heard before staff responded.

**Chairperson Weaver** called for a recess at 9:35 p.m.

**Chairperson Weaver** called the meeting back to order at 9:45 p.m. and announced that she planned to read the names of people who submitted a speaker's card but did not wish to speak at the end of Public Comments.

**Michael Gianfagna**, Avalon Terrace resident, feared what would happen to the value of his property as the result of Measure T, since his home would be above the Toe of the Hill. He understood that Measure T was law and must be implemented. However, the Measure was ambiguous and the implementation could be done many different ways. He asked that that some way be found with the interpretation of the Toe of the hill where existing homes would not be affected, the letter of the law would still be upheld and the open spaces would be protected.

**Linea McPherson**, Avalon resident, was dismayed that the majority of the Avalon homes would be affected, as she supported Measure T believing that it would protect only undeveloped open space. It would force any homeowner above the Toe of the Hill to undergo a long process to make changes to his home, along with the long process with the Homeowners Association. It was unfair to treat half of the neighbors in the Avalon community different from the other half. She read Section 3 and stated that she disagreed that the homeowners' constitutional rights would be unaffected.

**Commissioner King** asked the speaker's perception regarding the difference between what was required now by the City and what would be required under Measure T concerning additions or changes to her home.

**Ms. McPherson** replied that a general permit could not be applied for. Homeowners would have to go through an extra process. She suggested that the existing homes and structures that would be located above the toe of the hill be grandfathered.

**Stephen Ho**, Avalon resident, made a presentation. He claimed that Measure T was vague and unjust. He questioned why 1995 data was used. The natural grade did not mean "ancient grade" and was not necessarily the same as it was in 1956. He stated that the City Engineer helped him to learn to be a topographer in a week, along with USGS people. If a different method of determining the grade, as he suggested, would make the line very smooth and everyone would be happy. He questioned why a 40 measuring grid was used. The 100-foot "draw across principle" would make a big difference. He offered to continue work with the City Engineer to help to create a solution that the City and the Avalon homeowners would be happy with.

**Dave Yun**, Avalon resident, stated that the Avalon and Ponderosa residents had a vested interest in protecting the hills, as they were literally in the residents' back yards. The use of the 100-foot "draw across principle" made quite a bit of difference in how the line was drawn, although a comment was made that one could not see 100 feet. One hundred feet was equal to ten lanes of freeway. He displayed the map shown on the City's web page that showed the Toe of the Hill line and it seemed that various homes had been purposely included where the line went through rather than around the Avalon development. He showed his suggestion for the line that followed the toe of the hill and the 20 percent contour and wrapped around the Avalon and Ponderosa communities. He asked that some non-divisive way be found to solve this problem.

**Commissioner King** complimented the speakers for the excellent document and giving the City an alternative idea. He asked if the speakers were suggesting that the Toe of the Hill line should be above every existing home in the City.

**Mr. Yun** replied that he was speaking only to the way the line was drawn.

**Mr. Ho** believed that the sustaining distance, the moving average and resolution determined the line. The engineer used the most highest resolution available.

**Commissioner King** asked if he could answer his question.

**Mr. Ho** replied that the answer was "no." His solution would solve the problem.

**Commissioner Natarajan** congratulated City Engineer Hughes for training Mr. Ho so that he could become an expert.

**Bruce Bateman**, Avalon resident, sympathized with the Commission for the Solomon-like decision that they had to make. He stated that if a line was drawn through the middle of the subdivision that caused one house to be zoned residential and the house next door to be zoned open space, the procedures to change the homes on each property would be different, which was unequal and violated the equal protection standards of the constitution. His home was on a large piece of property with an unlandscaped steep slope. He read from Section 12, Subparagraph C of Measure T and stated that his backyard was currently landscaped in natural hillside vegetation – weeds. He asked if he would have to come to the Planning Commission for approval of a landscape plan where his next-door neighbor would only have to go to the homeowners association for approval. He then read from Section 16,

Development of Measure T and asked if he wanted to grade or terrace his back yard would he have to come to the Commission for approval.

**Commissioner King** asked if his argument was that this was an unequal protection law. He asked how he would reconcile that with an opinion sustained by the California courts concerning different property tax rates under Proposition 13.

**Mr. Bateman** replied that he was correct. In that case, the value of the home was changed when the property was sold or bought, which was a voluntary act on the homeowner's part. There had been no voluntary act on his part, if the value of his property was changed as the result of this proposal.

**Bhaskar Chadalavada** stated that he did not wish to speak.

**Gene Yamasaki**, Avalon resident, stated that the previous speakers had already covered his concerns. He thanked the Commission for listening to the speakers and asked that serious consideration be taken regarding those concerns.

**Blair Dahl**, MCP Industries a long-time property owner since the 1960s. He stated that he had two-year old, one-foot topography that showed a real discrepancy with this proposed Toe of the Hill, which drew the line at the bottom of an old mine excavation and was clearly not a natural slope. He had some historical photos that showed the grade moving up above where the line should be. He suggested that a process be created that could administer these anomalies, as there were sure to be more as proposals came to the City. Staff needed latitude to use, perhaps, better data than the five-foot topo. The ten-foot line could be ten acres, according to the proposal.

**Sharon Murray**, Avalon resident, stated that she had voted for Measure T and did not plan to add a pool or enlarge her home. However, when she sold her home, she would have to divulge to potential buyers that her home had been rezoned open space. She asked how this would affect the value of her home in the future. Measure T was very vague and would be a "nightmare to enforce."

**Lawrence Fok**, Ponderosa Heights resident, stated that he had read in the paper that his home could be rezoned to open space, which was a surprise to him. He believed that most of his neighbors were not aware of this and believed that many of them would be in attendance at this meeting if they were. He had the same concerns as had been expressed by previous speakers.

**Eugene Kiang**, Avalon resident, stated that he had many questions, but the Association President covered many of them. He strongly urged the Commission to consider the proposal put forward by Mr. Ho and exclude both Avalon and Ponderosa Homes from the toe of the hill. He defended the Association President and thanked her for her passion.

**Kal Siddig**, Avalon resident, stated that he was a 30-year resident and local realtor. He believed that the homeowners' rights were being taken away from them rather than the City supporting their quiet neighborhood. He worried about the City making a decision that was an interpretation of Measure T that could be reinterpreted a different way by different staff in the future. It seemed that more time was put into studying pig farms in the open space than the hundreds of homes that would be affected. Avalon and Ponderosa made up two percent of the hillside that would be affected by Measure T and he felt that both communities should be exempted. This agenda was supported by the people who wrote Measure T, who fought the building of Avalon Heights and who fought the golf course. He asked what would happen with the golf course as a result of this action.

**Dan Nijjar**, Avalon resident, stated that he had lived throughout the tri-city area and felt that Fremont was the best city. He asked that the Commission listen to all of the speakers and to help them.

**Chairperson Weaver** read the names of the people who indicated that they did not wish to speak who were opposed to the Toe of the Hill boundary:

David Nguyen  
Barbara Lee  
Shirley Chin  
Jana Holt  
Dana Powers  
Elaine Richardson  
Ronny Soetarman

Joey Cattone  
Iggoni Fajardo  
Ruby Chatterjee  
Toral Patel  
Sabina Chitkara  
Archana Sharma  
Mala Utamsing

Sandra Joe & Sal Yun Tsui  
Rani Sharma  
Betty Wang  
Michael Wang  
Wai-Kai Chen

**Chairperson Weaver** closed the public hearing and asked staff to address the questions raised by the speakers and the Commissioners.

**Senior Deputy City Attorney Seto** stated that Measure T did specifically mandate in Section 4 that all properties above the toe of the hill would change their General Plan designation to Hill Open Space. However, the zoning district for homes in Avalon and Ponderosa would remain planned districts, so no zoning change was being proposed. Both communities had always been subject to the development rules within their planned districts and those rules would not change. When a homeowner came to the City with plans to expand an existing home or to build a new home on a currently vacant lot, that proposal would be subject to the Measure T limitations (i.e., a second story - the planned district already had an existing height limit). The homeowners would all maintain their right to keep their single-family home residence and would maintain the legal right to expand their residences, so long as the expansions met the requirements of Measure T. Vacant lots could be developed, as long as they met the Measure T requirements (i.e., height, visibility, etc.). The definition of the Toe of the Hill was specifically in the provisions of Measure T. The City Engineer had proposed implementing that based upon the principals that he had outlined. If the Commission or the Council chose to exempt various portions of the hill area, the same equal protection issues that some of the speakers raised would apply to other areas of the City. These exemptions would entirely change the principals or the definition of the Toe of the Hill would be changed, which would not be permitted because that was the Toe of the Hill that had been adopted by the voters.

**Senior Deputy City Attorney Seto** continued with a discussion about equal protection concerns regarding the Avalon and Ponderosa area. Equal protection rights applied to people's fundamental rights. Concern about additional levels of bureaucracy was understood, but "the ability to avoid a public hearing was not a fundamental, legal right." The proposed changes would still allow people to develop vacant lots or allow the expansion of an existing home. Their fundamental rights would be preserved, with regard to property issues, and this did not violate their equal protection. She asked for questions concerning these issues.

**Commissioner King** asked if anyone in the City had challenged the legality of Measure T in court. If so, what happened?

**Senior Deputy City Attorney Seto** replied that no challenges had been made concerning the legality of Measure T, but a lawsuit had been filed by people who felt that the City had not properly implemented Measure T. That case was settled, which related to the Sprint Telecommunications behind the Papillon Restaurant on Mission Boulevard.



**Commissioner King** asked what the difference was for a homeowner who was located above the Toe of the Hill and one who was below it in terms of a home expansion and enhancing one's property. Property value was a fundamental concern expressed by the speakers.

**Deputy Planning Director Schwob** gave an example of a property in a planned district that would be above and below the Toe of the Hill line. Within a planned district, if a homeowner wished to build a home over 7,500 square feet (whether an addition to the home would bring the total square feet to that size, an initial construction or an accessory structure that was 600 square feet or more), it had to be reviewed and approved by the Planning Commission. It would have to meet the requirements of that particular planned district zone and all of the City's hillside design and standard requirements. These include the general zoning rules of height, setbacks, general policies in place for hillside development and all of the normal city municipal code requirements.

**Commissioner King** asked if both the communities were in a planned district and if all those rules currently applied.

**Deputy Planning Director Schwob** replied that they had always applied. In some planned districts, the Planning Commission had delegated the authority to staff to review additions and modification, or even construction, of some homes that were under the 7,500 square foot threshold. Tonight's proposal was that only homes above the toe of the hill that had breached the 7,500 square foot threshold (and accessory structures over 600 square feet) would have to be reviewed by the Planning Commission. The proposal presented at the community meeting was that anything above the toe of the hill, regardless of size, would have had to be reviewed by the Planning Commission. Staff used the same review criteria that the Planning Commission used.

**Commissioner King** asked if there was no difference between what a homeowner could do if located above the toe of the hill as opposed to below the toe of the hill and if Measure T would be met if the toe line were set above the Avalon and Ponderosa communities.

**Deputy Planning Director Schwob** replied that if a homeowner was located above the toe of the hill, the visual safeguards and the other provisions of Measure T would have to be considered in the review, such as, visibility minimized from public places, no construction within 200 feet of riparian corridors and environmental issues, which were generally taken into consideration during the normal planning process, anyway. Now the parameters had been set and were specific.

**City Engineer Hughes** replied that Measure T would not be met if the toe line were set above Avalon and Ponderosa. Measure T specifically required that the toe be set at the first 20 percent slope line above I-680. The line proposed by Mr. Ho was another 20 percent line at another grade break higher on the hill that was the second major 20 percent grade break. The grade break stopped at Warren Avenue and a line had to be extended along the northern creek of Avalon, which connected the line at the other side.

**Commissioner King** asked if Mr. Ho's presentation would be legal and would comply with Measure T.

**City Engineer Hughes** stated that, in his opinion, it would not.

**Commissioner Natarajan** asked how many undeveloped parcels were in Avalon and how the golf course would fit into the change of the definition of the toe of the hill.

**Deputy Planning Director Schwob** stated that approximately five were left. Two parcels had entitlements that had been granted by a previous Planning Commission and would be honored. Some lots were above the previous Toe of the Hill line and some were at the bases of cul-de-sacs close to I-680 that would require Planning Commission review.

**Senior Deputy City Attorney Seto** replied that the Doublewood Golf Course was subject to a development agreement and, under state law, a development agreement granted a property owner vested rights to continue to develop, based upon that agreement, which was still in effect. The golf course would not be subject to Measure T, because it had preexisting legal rights. The development agreement that concerned Avalon had expired and the vested rights no longer continued in that area.

**Commissioner Natarajan** asked if the way constrained land was defined at this time was consistent with Measure T, i.e., the 30 percent slope, and would the owner have had to go through a review process with regard to landscaping.

**Deputy Planning Director Schwob** said that constrained land was considered to be a 30 percent slope under Measure A. However, the Planning Commission could have allowed minor encroachments. Past practice by the Planning Commission was to tell proponents to remove the encroachment. Measure T did not allow any encroachment.

**City Engineer Hughes** replied that planting plants on a 30 percent slope was not previously controlled. However, grading had always been controlled. Terracing had never been allowed under the grading ordinance, even before Measure A. Cutting or filling more than two feet on a 30 percent slope was not allowed without a grading permit.

**Commissioner Natarajan** asked if Measure T required that landscaping undergo an approval process.

**City Engineer Hughes** answered that landscaping, per se – planting plants, did not require an approval, but any grading required a grading permit.

**Commissioner Natarajan** asked if Avalon had more restrictive height limits. If those lots were within the toe of the hill, would the requirement be a 30-foot height.

**Deputy Planning Director Schwob** stated that she was correct. Lots closer to I-680 could not be higher than 25 feet. The more restrictive requirement would apply, which was a height limit of 25 feet.

**Commissioner Harrison** asked if the development agreement had expired for the Avalon and Ponderosa communities because it was set to expire in ten years and when did it expire. He asked if the extension was not applied for was because the developments were built out and it was deemed unnecessary. Was it possible for the City to honor that agreement? Did Measure T not affect the validity of existing legal parcels?

**Senior Deputy City Attorney Seto** agreed. Under State law, development agreements had a set time period and they could be extended. It would take the homeowners and the owners of the vacant lots to come together to make an extension application. The Avalon development agreement expired in 2001. Under State law, rights were vested when the development agreement was approved. A new development agreement would be subject to Measure T. A legal lot of record remained a legal lot under Measure T and retained development rights. However, when that lot was developed, it had to meet the Measure T restrictions to the greatest extent possible.

**Chairperson Weaver** added that Commissioner Harrison's last question referred to the list of questions (specifically, Question 15) that came out of the community meeting.

**Commissioner Harrison** asked if many of the Avalon lots would now be nonconforming lots "sitting out there in perpetuity." If a house were damaged, for example by fire, would repairs or replacement be allowed as long as it conformed to the previous footprint?

**Senior Deputy City Attorney Seto** stated that the Avalon and Ponderosa communities would remain zoned planned districts and residential uses were allowed in those planned districts. They would remain legal lots of record, their uses would remain legal and they would not be nonconforming as a result of this proposed action. Even in open space areas, residential uses were allowed. Anyone above the toe of the hill would have the right to replace a damaged home to the existing footprint, under staff's proposal.

**Vice-Chairperson Wieckowski** believed that the visual protection, as approved by the voters, was in conflict with allowing a lot owner to rebuild on the exact same area. That site might not be the best location, visually, where the home could be rebuilt. Some of the homes were particularly obtrusive on the ridgeline and the general public would be better served if they were moved to a different location within the lot if they were, for example, destroyed by fire.

**Senior Deputy City Attorney Seto** answered that this proposal best represented the community's interest.

**Commissioner Harrison** asked if, in essence, in many instances the level of bureaucracy would be reduced, because approval could be performed by staff rather than the Planning Commission. He asked about the comments made by speakers that 1956 technology/map was used as a basis for the Toe of the Hill line. He recalled this same argument was used when the Planning Commission was discussing the Mission Peak Landslide and the City and residents were able to come to an agreement after several meetings. He wondered if something like that could be done here.

**Deputy Planning Director Schwob** replied that what was heard at the community meeting was that there was additional cost, as well extra time involved, when the Planning Commission had to review and approve proposals. An example was a recent request for a sunroom addition at the back of a home that was approved on the Planning Commission's consent calendar. However, with a second-story addition in a highly visible area, staff might recommend that it be added on ground level in a way that would not be as visual. If the applicant disagreed with staff, it would come to the Planning Commission for that determination and the determination could be appealed to the City Council by either side.

**City Engineer Hughes** replied that 1956 technology was not used for the 2002 map. However, the aerial topography taken in 1956 was used to answer questions about where the natural grade had been many years ago in areas where staff knew grading had occurred. Unfortunately, the property that Blair Dahl represented was a quarry in 1956 and had been graded. If subsequent information was obtained that showed the natural grade of that property, the line would be changed to reflect the new information. He agreed that one-foot topography was more accurate. A licensed professional would be allowed to perform a more accurate topography to make minor adjustments (one or two feet) to the Toe of the Hill line on a site-specific basis.

**Commissioner Lydon** understood that although, if passed, these properties would be rezoned but the existing planned districts kept all the owners' rights, privileges and opportunities to be exactly the same or slightly different in some cases.

**Senior Deputy City Attorney Seto** clarified that, if the Commission approved the recommendations, the General Plan designation for the two areas would be changed to Hill

or Hill Face Open Space. However, the zoning would remain Planned District. Those properties above the Toe of the Hill would also be subject to the Measure T requirements.

**Commissioner Lydon** noted that the fears heard about a rezoning and loss of property values were not correct.

**Commissioner Sharma** asked if Measure T stated that if the City had a legal liability, it could be for or against Measure T. It seemed that, in some cases, a lawsuit could be instigated. If a legal liability occurred for the City, he asked if Measure T would be implemented. It seemed that it did not matter what the City did, there would be a lawsuit.

**Senior Deputy City Attorney Seto** agreed that there would probably be a lawsuit, no matter what the Commission did. Section 3 of Measure T had language that the protection of legal rights would be to the extent as determined by a court. A lawsuit would have to happen so that a court could make that determination.

**Commissioner King** asked if there was any difference between a person with property below the toe line or someone with property above the toe line concerning how much footage would be allowed to be added to the original home.

**Deputy Planning Director Schwob** replied that the limit for above the toe line, as regulated by Measure T and was different from that allowed below the toe line. Above the toe line, a lot of under 20 acres could be allowed to accommodate a total of 10,000 square feet for all structures. If the lot was 20 acres or more, it could up to 20,000 square feet or one percent of the lot area, whichever is less.

**Commissioner King** asked what the difference in allowable height would be between homeowners above and below the toe line.

**Deputy Planning Director Schwob** replied that no difference was proposed. Measure T would allow a 35-foot height limit, however, current zoning rules and regulations allowed for a 30-foot height limit. Measure T did allow the City to establish its own zoning rules and regulations that may be more restrictive. Adding more height could affect the visual safeguard provisions under Measure T.

**Commissioner Harrison** asked if Measure T would allow the City to grant a visual waiver for Avalon and Ponderosa.

**Senior Deputy City Attorney Seto** answered that Measure T allowed more restrictive provisions, not less restrictive provisions. The 30-foot height limit was more restrictive.

**Vice-Chairperson Wieckowski** noted that all of the Avalon homeowners agreed to strict restrictions on development, per the planned districts and homeowners associations. Without Measure T, they still had to abide by certain rules concerning additions or landscaping, compared to someone who lived below the toe of the hill and was not a part of a homeowners association.

**Deputy Planning Director Schwob** agreed that each planned district had its own set of regulations and requirements that might be entirely different somewhere else in the City. Homeowners would have to adhere to their own rules in addition to the visual safeguard provisions if they were above the toe of the hill.

**Commissioner Lydon** wondered if the City was in the process of “going off a cliff, here, and now we’re deciding how fast we’re going to go when we go over the edge.” Was there a legal process, short of litigation, to obtain an opinion that was binding or one that everyone could live with?

**Senior Deputy City Attorney Seto** replied that State law had specific provisions where decisions of Cities acting as legislative bodies could go to court and ask for a "Validation Proceeding", which asked if the court would validate the actions that were taken. That avenue was not allowed by State law in this particular situation, so interested parties would have to bring a lawsuit so that determination could be made.

**Commissioner Natarajan** asked if a more accurate survey was performed concerning toe of the hill, was that a General Plan amendment process. What percentage of the hill area developments fell under a PD zoning.

**City Engineer Hughes** stated that it could be. If the line moved just ten feet, it would not cause an amendment, because it would be within General Plan parameters. Anything that could be seen and would cause a redrawing of the maps would generate a General Plan amendment and rezoning.

**Deputy Planning Director Schwob** replied that southern Fremont area above I-680 was predominately developed under planned districts. The northerly two-thirds of the city was not. He passed a map to the Commissioners that showed the planned districts. Rezoning would occur on the Vargas plateau and in the Niles hills where the zoning was R-1-80 and R-1-160, respectively. Properties zoned R-1 now above the Toe of the Hill line along Mission Boulevard (and other areas) would be rezoned to Open Space, Hill Face Open Space or Hill Open Space. The General Plan land uses would also change. The Planned District Ordinance was amended to say that the provisions of Measure T applied to those planned districts above the Toe of the Hill.

**Commissioner Natarajan** opined that the planned districts in the hillside communities had already achieved what was Measure T was trying to achieve. Was it possible to exempt projects with PDs from the toe of the hill requirements, as long as the underlying PD zoning included some of those same Measure T requirements?

**Deputy Planning Director Schwob** stated that analysis of the many PDs in the City were that some included provisions for hill area protection while others did not.

**Deputy Director Daniel** stated that if the individual PD zoning was consistent with Measure T and already complied with all of the provisions of Measure T, the proposed would be no change. If the PD zoning did not incorporate the requirements of Measure T, the proposed Zoning Text Amendment would have that effect.

**Commissioner Natarajan** believed that although the actual effect was the same when a PD included all of the Measure T provisions, the perceptual effect was different. As long as the practical effect was the same, "do we care whether it's designated as Hill Face Open Space or if it's whatever the General Plan designation is right now?"

**Senior Deputy City Attorney Seto** agreed that the practical effect could be the same, if happened that the planned district had the same type of conditions as Measure T. In Section 4C, Measure T specifically stated that the areas had to be redesignated Hill or Hill Face Open Space. So the General Plan designation would change with respect to the toe of the hill.

**Commissioner Harrison** opined that the biggest hurdle was the visual impacts. He wondered if the cart was before the horse by drawing the line before the City knew what the rules were.

**Commissioner Natarajan** argued that many of the PDs had height restrictions, restrictions to single-family units. She recalled going through this whole issue a few meetings ago with the

review of a 16,000 square foot home and trying to minimize the visual impact from public spaces when there was no definition of what they were.

**Deputy Planning Director Schwob** stated that Measure T listed examples of public places, such as roads, trails, other public places. The threshold for minimizing visibility was based upon all the other factors and is where the discretion came in. He clarified that the current General Plan Land Use Map for Avalon showed predominately that the area was a combination of Open Space (.25 to 1 unit per acre) and Hill Face Open Space. The difference would be that the entire Avalon area would be shown as Hill Face Open Space and the rules and regulations among Open Space, Hill Face Open Space and Hill Open Space designations, above the toe of the hill, are identical.

**Commissioner Natarajan** asked if the toe of the hill changed the General Plan designation from something that was residential to open space and if the General Plan designation would be the same throughout the whole development.

**Deputy Planning Director Schwob** that she was correct. However, it would now be one kind of open space rather than one of three kinds. Below the toe of the hill, however, would stay the same, which was, predominately, Open Space.

**Commissioner King** preferred to look at this issue again at the beginning at the next hearing when everyone was fresh. He still was not clear whether homeowners' rights would be changed if their homes were redesignated to be above the toe of the hill. He believed that a court would sustain an existing homeowner's right and would decide that the majority vote of a community could not take away that right. He would not support these amendments if a vote were called for at this hearing.

**Commissioner Lydon** asked if a yea or nay vote would not negate a trip to court.

**Planning Director Meeker** agreed that he was probably correct.

**Chairperson Weaver** agreed that, one way or the other, the City would go to court. However, the Commission's job was to listen to the homeowners' concerns and decide if their interpretation that Measure T would affect them in an adverse way was, in fact, accurate, and if, in fact, the City could change the designation of their developments. She did not see a choice if the first 20 percent was used, as mandated in Measure T. Attorneys saw this all the time. Even the framers of the Constitution could not envision all of the issues that have come up over the years. It was up to the courts to interpret it.

**Commissioner Sharma** asked if the majority of the community decided to take rights from a minority of the community, could the Commission be expected to side with the majority, when equal rights seemed to be the issue.

**Chairperson Weaver** replied that the issue was how Measure T was to be instituted. Was the Toe of the Hill line to start at the first 20 percent? And if it was, then the line could not be started further up the hill at another 20 percent grade.

**Commissioner Natarajan** asked if this change in General Plan designation was explained to the Community during their meeting the way it had been presented to the Commission. It seemed that there were many misperceptions about what could and could not be done. It did not seem to be so much the Toe of the Hill line as much as property rights and similar issues. There were many other issues that also needed to be discussed. She wondered if another community meeting should be held.

**Deputy Planning Director Schwob** replied that a different process had been outlined at the community meeting and some members of the homeowners association were updated.

Some parts of Avalon did have residential designations and were not shown above the toe of the hill. All of the community, however, did share a common planned district zone.

**Deputy Director Daniel** stated that she and City Engineer Hughes attended the Ponderosa Homeowners Association annual board meeting to explain the proposals.

**Commissioner Natarajan** asked if the concerns were the same.

**Deputy Director Daniel** stated that there were several questions, but they were not the same.

**Commissioner Natarajan** asked if the Ponderosa development would have half of the residents above the Toe of the Hill Line and half below.

**City Engineer Hughes** stated that all of Ponderosa would be above the new toe line.

**Commissioner King** said that courts routinely threw out things that a majority of people passed. He believed that new lots and new houses could be restricted. His concern was with existing lots and homes. He would prefer that the line acknowledge the rights of existing homeowners and let those who did not like it go to the court. "Changing the rules at the end of the game just bothers me in the sense of fairness."

**Vice-Chairperson Wieckowski** stated that he took a different perspective. He was not convinced that property rights would be affected. He recalled that the Avalon development created a "huge controversy" with the building of such a large community in the hills. Council Members lost their seats because of the decisions they had made. If the homeowners chose to live in this separate, gated community, then they chose to live with certain restrictions. Some of the voters were angry that the City Council allowed this project to go through and now the voters passed another initiative and they were looking to the Commission and Council to protect the visual impact of the hills from public places. He felt that he was representing all the people, not just the homeowners in Avalon. It was appropriate if a homeowner above the toe of the hill had to obtain Planning Commission approval for an improvement to their property. He complimented staff on their analysis. He would like to see "Measure T in all its glory" applied to a home located above the toe of the hill that was destroyed and allow it to rebuilt somewhere else on the lot, if possible, to protect the visual plane of the ridges from public places, which would fulfill the spirit of Measure T.

**Commissioner Harrison** recalled being asked about Measure T by the press and he thought then that it would be interpreted by a body further on down the road. He never imagined that he would be a member of that body. He agreed with Commissioner King and wondered why the rush toward a solution at this point. He also agreed with one of the speakers who pointed out that approximately two percent of the hill seemed to be the controversial point. He asked if it was possible to approve all but that two percent and leave it to be dealt with later by the City and Avalon.

**Senior Deputy City Attorney Seto** replied that the implementation of Measure T required a designation of a single line. She reminded everyone that the City Engineer had stated that a process existed where individual property owners could bring forward information to change the line, as it affected their property.

**Commissioner King** asked what the deadline was before which a decision had to be made.

**Senior Deputy City Attorney Seto** said that there was no deadline. However, the measure was passed in 2002 and each application came into the City, it was difficult to determine if their project was above or below the toe of the hill.

**Deputy Director Daniel** added that this line existed in the world and existed when Measure T was adopted. The City was trying to locate it on a map to assist property owners.

**Commissioner Harrison** asked if the lesson to communities was to never let developmental agreements to expire. If that development agreement had not expired, he asked if the Commission and the public “would be sitting here, right now.”

**Senior Deputy City Attorney Seto** replied that extending the development agreement was a costly process and the City would have had to take action. Based upon what the voters said in 2002, there might not have been any interest on the part of the City.

**Commissioner King** moved that this item be the first item heard at the July 8<sup>th</sup> meeting. In the interim, the Commissioners individually could explore the issue more thoroughly.

**Commissioner Harrison** asked if staff could be encouraged to interact with Avalon to try to find some mutual ground.

**Commissioner Natarajan** asked if the Toe of the Hill was being tabled or was the rest of the discussion (i.e. performance standards) to be tabled, as well.

**Commissioner King** assumed that all of the discussion would be tabled.

**Chairperson Weaver** asked if Commissioner King wanted to table everything to do with the two items until the next meeting. She expected that there would be the same number of speakers (or more) and nothing would be changed. As some point, a vote had to be taken.

**Commissioner Sharma** asked what would be different in two weeks than was apparent now. He wanted assurance that staff would meet with Avalon representatives and reconsider the toe line.

**Commissioner King** stated that the motion was for the Commissioners' benefit. To allow them to consider this issue when they were fresh and had had some time to think about it. It would be wonderful if staff was able to resolve the issues that had been raised at this meeting.

**Commissioner Harrison** asked for a smaller version of the map to aid his decision.

**IT WAS MOVED (KING/HARRISON) AND CARRIED BY THE FOLLOWING VOTE (5-2-0-0)**  
**THAT THE PLANNING COMMISSION TABLE ITEMS 4 AND 5 AND CONTINUE TO JULY 8, 2004, TO BE FIRST ON THE AGENDA TO BE HEARD.**

The motion carried by the following vote:

AYES: 5 – Harrison, King, Lydon, Natarajan, Sharma  
NOES: 2 – Weaver, Wieckowski  
ABSTAIN: 0  
ABSENT: 0  
RECUSE: 0

## **MISCELLANEOUS ITEMS**

Information from Commission and Staff:

- Information from staff: Staff will report on matters of interest.



- **Planning Director Meeker** announced that the City Council had approved the ordinance on Game and Computing Arcades.

**Deputy Planning Director Schwob** stated that Bay Street Planned District and the Mixed Use Ordinance was also approved by City Council.

- **Deputy Planning Director Schwob** asked for discussion regarding cancellation of the December 9, 2004 Planning Commission meeting and scheduling a special meeting on December 16, 2004, because the Mayor's farewell celebration was on that date.

**Chairperson Weaver** stated that she had a standard meeting on the third Thursday of the month and would not be available on December 16<sup>th</sup>.

Other dates were discussed and it was decided to decide during the next meeting.

- **Commissioner Harrison** asked that Mr. Robson's idea come back as a study session.
- **Chairperson Weaver** reminded the Commission that a study session would be held at 6:00 p.m. before the next meeting on July 8<sup>th</sup> and a study session would be held after the meeting, as well.

**Deputy Planning Director Schwob** clarified that the Irvington Concept Plan would not be heard on July 8<sup>th</sup>, but three other items would be heard after tonight's continued item was heard.

**Commissioner Natarajan** asked if material for both study sessions would be available to the Commissioners before July 8<sup>th</sup>.

**Deputy Planning Director Schwob** agreed that the material would be available in their packets.

- Information from Commission: Commission members may report on matters of interest.
- **Commissioner Sharma** had noticed different signs on the windows of a new furniture store off I-880.

**Deputy Planning Director Schwob** agreed to look at it.

**Commissioner Harrison** complimented staff on the last issue discussed.

**Commissioner Natarajan** asked about follow up the comments made concerning the housing element. She asked staff to consider opening up the CBD for high density housing, the pros and cons regarding housing in Pacific Commons, housing in south Fremont and looking at the BART property in its entirety for housing.

**Planning Director Meeker** stated that he had seen alternatives that were housing oriented.

**Commissioner Natarajan** asked that an analysis that explained why housing was not being considered within the CBD and the BART station be performed.

**Deputy Planning Director Schwob** stated that because the existing BART station parking lots were on the fringe of the CBD, BART officials could be contacted to ascertain if there was interest. That could be reported as part of the housing element implementation.

Meeting adjourned at 11:45 p.m.

SUBMITTED BY:

APPROVED BY:

Alice Malotte  
Recording Clerk

Jeff Schwob, Secretary  
Planning Commission